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No. 01-309

Supreme Court, U.S.
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In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Eleventh Circuit properly granted judgment in favor of the respondents based on qualified immunity.

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JURISDICTIONAL BASIS

The petitioner incorrectly states that the United States Court of Appeals for the Eleventh Circuit reversed in part and denied in part the decision of the District Court. (Pet. Brf. 1). The Eleventh Circuit affirmed the judgment of the District Court. (Pet. Brf. App. 13-14); *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001).

STATEMENT OF THE CASE

Inmates in the Alabama prison system are required to work while incarcerated; this includes farm work. If an inmate refuses to work with the assigned work squad or is disruptive to the work squad, then that inmate is not sent back to his dorm or cell. Instead, under a statewide Alabama Department of Corrections administrative rule, a metal post is used by prison officials to handcuff a prisoner. The inmate is handcuffed to a post (i.e., restraining bar) between waist and shoulder link depending on their height. The statewide rule directs that an inmate remain on the restraining bar until he agrees to return to work or his work squad comes in for the day. While on the restraining bar, the inmate receives food, water, and bathroom breaks. Inmates are given opportunities to express their desire to return to their work squad and begin working. If an inmate refuses to return to work, he is released from the restraining bar when his work squad returns to the facility.

This statewide administrative rule was instituted to encourage work and to keep order. In the past, allowing an inmate to go back and lay on his bed while others

worked only increased the incentive for an inmate to refuse to work, attempt to disrupt others working, or disrupt the work site. The restraining bar at Limestone Correctional Facility is a horizontal pole with rings about five feet tall that allowed handcuffs to be secured to it.[1] The restraining bar is referred to by the inmates and correctional officers as the "hitching post".

Inmate Larry Hope, the petitioner, was assigned to work on a farm squad at Limestone Correctional Facility. On two occasions, Hope disrupted the work squad and was placed on a restraining bar.

A. May 11, 1995, Incident

The petitioner was incarcerated at the Limestone Correctional Facility in 1995 and assigned to a farm squad. On May 11, 1995, while on the chain gang, the petitioner and another inmate got into a verbal altercation. Officer McClaran concluded that the altercation was the petitioner's fault and ordered the petitioner put on the hitching post for being "disruptive to the work squad." (Record on Appeal Doc. 32, ¶ 5[2] herein after Doc.). According to the petitioner, Sergeant Pelzer placed him on the hitching post at 12:30 p.m. (*Id.* ¶ 7). The incident report, however, shows Officers Gates and

[1] The allegation that the post was as high as the petitioners head is false. The post was at most shoulder high.

[2] Documents refer to the number on the clerk record to the Court of Appeals for the Eleventh Circuit.

Dempsey[3] placed the petitioner on the restraining bar. (*Id.*; *see also* Doc. 11, Exhibit 7, Incident Report, p. 2). Neither a disciplinary write-up, nor a hearing preceded the petitioner's placement on the restraining bar.

Captain David J. Wise later concluded that the other inmate was responsible for the altercation and ordered the petitioner released at 2:40 p.m. The Department of Corrections "Activity Log" for the restraining bar indicates that during the two hours the petitioner was restrained on the bar, he was offered water and a restroom break every fifteen minutes. (Doc. 11, Activity Log). Of the nine times he was offered water or a restroom break, the petitioner refused every offer of water and all but one offer of a restroom break. *Id.*

After being released from the restraining bar, a physical examination of the petitioner was conducted by an institution nurse at approximately 6:50 p.m. The examination revealed no signs of bruises, contusions, abrasions, lacerations, trauma, or illness. (Doc. 11, Hope Emergency/Treatment Record).

B. June 7, 1995, Incident

On June 7, 1995, the petitioner was involved in another altercation when, according to accounts provided by petitioner, a correctional officer "cursed [him] and grabbed [him] by the neck because [he] was sleeping on the bus on the way to a work site." (Doc. 32, ¶ 11). The petitioner avers that because he began choking, he

[3] Officer Dempsey is not named as a defendant in the instant case.

attempted to get the officer to release his grip. At that time, Officers Loggins, Kent, Jackson, Stephenson, and McGhee arrived and "subdued, handcuffed, placed [the petitioner] in leg irons, transported him back to Limestone, and put [him] on the hitching post."[4] (Doc. 32, ¶ 13).

According to the respondents, at approximately 10:30 a.m., Officer James Kent instructed the inmates on the bus to exit. After the order was repeated several times and five inmates, including the petitioner, failed to respond, Officer Loggins entered the bus and instructed the petitioner to get off. The petitioner responded to Loggins by saying, "Fuck you." (Doc. 17, Kent's Affidavit, pp. 1-2; Doc. 20, Loggins's Affidavit, p. 2). The petitioner also started towards Officer Loggins in an aggressive manner and reached out to grab Officer Loggins by the throat. *Id.* Officer Jackson stepped onto the bus and saw the petitioner trying to grab Officer Loggins around the neck. (Doc. 11, Ex. 3, Jackson's Affidavit, pp. 1-2). Jackson was trying to help Officer Loggins control the petitioner when they all tripped and fell off the bus. Officers Loggins, Kent, Mealer, and the petitioner fell on top of Jackson. (*Id.*, pp. 1-2). From approximately thirty yards away Officer Joseph Stephenson observed the officers and the petitioner fall off the bus and ordered the remainder of the inmate squad to sit on the ground. Officers Jackson, Loggins, and Kent handcuffed the petitioner. (Doc. 11, Ex. 5, Stephenson's Affidavit, pp. 1-2). Officer Pelzer was conducting security checks on the

[4] In his affidavit, defendant McClaran states that he placed the petitioner on the restraining bar. (Doc. 11, Ex. 2, p. I).

other inmate squads and arrived at the scene after the altercation. Officer Pelzer helped place leg irons on the petitioner and escorted the petitioner to the security vehicle. (Doc. 11; Pelzer's Affidavit, pp. 1-2). At about 10:50 a.m., the petitioner was taken to the health care unit at the institution.

According to the petitioner's affidavit, which is attached to the original complaint, when the petitioner returned to the institution, he was taken to the health care unit where he did not receive any treatment for his injuries. (Doc. 1, Petitioner's Affidavit, p. 1). According to the evidence, however, the petitioner was examined by Nurse Wilda Nichols at about 11:35 a.m. (Doc. 11, Medical Record). Nurse Nichols observed that the petitioner's speech was normal, he had a few scattered bumps on his left shoulder, a reddened area to the right shoulder, no bleeding, no knots on his head, he denied visual disturbances, and he ambulated well. Nurse Nichols noted that no treatment was needed at that time. *Id.* Because the petitioner disrupted the work squad and was not out working with the rest of his squad, he was then placed on the restraining bar.

The respondents in this case are Correctional Officer I Gene McClaran, Sergeant Mark Pelzer, and Lieutenant Jim Gates. (Doc. 26, p. 2). The petitioner does not allege these respondents failed to follow the state-wide regulation of using the restraining bar, including giving food, water, and bathroom breaks. The petitioner's allegation is that the regulation is unconstitutional. There is no

allegation that these respondents were not responsible for instituting the regulation or continuing the policy.

REASONS FOR DENYING THE PETITION

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY GRANTED JUDGMENT IN FAVOR OF THE RESPONDENTS BASED ON QUALIFIED IMMUNITY.

The respondents are entitled to qualified immunity in this case. Public officials are entitled to qualified immunity from damages if "their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would know." *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), this Court clarified the appropriate standard by concluding that qualified immunity turns on the " 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken." *Id.* at 639 (citations omitted). This Court went on to note that, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, at 640.

The petitioner contends the Eleventh Circuit ignored the mandate in *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). *Lanier* and the instant case are diametrically different. *Lanier* involved a sitting state court judge who was criminally convicted under 18 U.S.C. §242 of violating the constitutional rights of five

women by sexually assaulting them. *Id.* Lanier assaulted these women in his judicial chambers including groping and orally raping some of these women. *Id.* at 261. In *Lanier*, this Court noted that general statements of law are not enough to impose liability. Liability may only be imposed "for deprivation of a constitutional right if, *but only if*, 'in light of pre-existing law the unlawfulness [under the Constitution is] apparent.' " *Id.* at 271-272 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)) (emphasis added); *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).

The instant case involves handcuffing inmates who refused to work to a restraining bar, until either they agree to go back to work, or their work squad comes in for the day. The inmate is provided food, water, and bathroom breaks during this period. This practice was not apparently unlawful and simply does not rise to the level of the violation in *Lanier*. As noted by the Eleventh Circuit, "[I]n 1995 . . . there was no case law in this circuit with facts and legal analysis clear enough to serve as a bright-line rule establishing this violation, so prison guards cannot be financially responsible for their actions." *Hope v. Pelzer*, 240 F.3d 975, 982 (11th Cir. 2001).

A. Prior case holdings did not articulate statements of law that gave sufficient warning to defeat qualified immunity.

The petitioner asserts that general statements of law provide the necessary framework to prohibit the respondents' conduct at issue in the present case. The petitioner

further contends that the precise method of restraint need not be addressed to place the respondents on notice that their actions violated constitutional rights.

> In *Anderson*, we explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. at 639, 107 S. Ct. 3034. "[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640, 107 S. Ct. 3034 (citations omitted); *see also United States v. Lanier*, 520 U.S. 259, 270, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

Wilson v. Layne, 526 U.S. 603, 614-615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).

As this Court recently stated, the inquiry into whether a right has been clearly established when making a determination on qualified immunity "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, ___U.S.___, 121 S. Ct. 2151, 2156, ___L. Ed. 2d___ (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

In *Lassiter v. Alabama A&M University*, 28 F.3d 1146 (11th Cir. 1994) (en banc), the Eleventh Circuit commented that "[t]he most common error we encounter, as a reviewing court, occurs on this point: Courts must not permit Plaintiffs to discharge their burden by referring to general rules and to the violation of abstract 'rights'." *Id.* at 1150.

In *Wilson v. Layne*, this Court determined the plaintiffs' Fourth Amendment rights had been violated by allowing the media to accompany officers to attempt an execution of an arrest warrant on their son. This Court held that the general protections of the Fourth Amendment were not enough to put the officers on notice that their actions violated the Fourth Amendment. *Wilson v. Layne*, 526 U.S. at 615. "[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* On May 11, 1995, the day the petitioner was first handcuffed at shoulder level on the restraining bar at Limestone Correctional Facility, it was not clearly established that the use of the restraining bar was cruel and unusual punishment. At that time, it would have simply not been clear to a reasonable officer that securing a highly disruptive inmate to a restraining bar, where the inmate is given full access to food, water, and a bathroom, violated a constitutional right. The respondents, therefore, were properly granted qualified immunity.

B. State correctional officers are entitled to qualified immunity for handcuffing inmates to a restraining bar, in part, because the precise method and conditions of restraint were not addressed by prior rulings.

The petitioner contends *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Ort v. White*, 813 F.2d 318 (11th Cir. 1987); and *Williams v. Burton*, 943 F.2d 1572 (11th Cir. 1991) clearly establish limits on the use and duration of restraints. In analyzing whether past decisions, including *Gates* and *Ort* were sufficient to place correctional officials on notice, the Eleventh Circuit correctly stated:

> Hope argues that several of our cases, including *Gates* and *Ort*, established a bright-line rule against use of the hitching post. While we recognize that the inappropriateness of the hitching post could be inferred from these opinions, a bright-line rule for qualified immunity purposes 'is not to be found in abstracts – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances'. . . . We do not find the language in *Gates*, *Ort*, or any other Eleventh Circuit or Supreme Court opinion established that impermissible use of the hitching post constitutes cruel and unusual punishment clearly enough that a "reasonable official would understand that what he is doing violates that right."

Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001) (citation omitted).

In *Ort v. White*, 813 F.2d 318 (11th Cir. 1987) there is a similarity to the petitioner's case. Ort was a problem on

the work squad refusing to work and refusing to carry the water for the squad. Consequently, Ort was denied water for those periods of time he refused to work. The Eleventh Circuit held the action was a necessary coercive measure undertaken to obtain compliance with prison rules, i.e., carrying the water and working. *Id.* at 325.

Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991), *cert. denied*, 505 U.S. 1208, 112 S. Ct. 3002, 120 L. Ed. 2d 877 (1992) concerned an inmate who was placed in four-point restraints for over twenty-eight hours with his mouth taped shut part of the time. In that case, the Eleventh Circuit held this type of restraint did not violate the inmate's Eighth Amendment rights. *Id.* at 1576.

The reading of *Gates*, as noted by the Eleventh Circuit in *Hope*, "was even a more distinct case" and was a system wide attack on prison conditions. *Hope v. Pelzer*, 240 F.3d at 981. The only mention of behavior similar to that alleged in the various complaints is contained in a portion of a paragraph in this thirty-one (31) page opinion, which reads that corporal punishment such as:

> administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and cell for long periods of time, shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods. . . . We have no difficulty in reaching the conclusion that these forms of punishment run

> afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.

Gates v. Collier, 501 F.2d at 1306. The opinion in *Gates* does not establish the law "in such concrete and factually defined context" that it would compel all reasonable correctional officers in the respondents' positions to conclude that their actions were unlawful. *Wilson v. Layne*, 526 U.S. at 615.

To require these respondents to draw this legal inference from these decisions would be an unrealistic expectation on these correctional officers. Such an expectation would require these correctional officers to draw inferences that even two federal magistrate judges, Judge Putnam and Judge McPherson, and two attorneys for parties of record were unable to draw after concerted legal research in the cases of *Whitson v. Lt. Gillikin*, CV-93-H-1517-NE (N.D. Ala. 1994) and *Hudson v. James*, CV-96-D-1266-N (M.D. Ala. 1998). In *Whitson*, the plaintiff was represented by counsel and he asserted claims that on July 6, 1993, he was denied needed medical attention and was handcuffed to a rail or bar for a period of eight hours without food, water, or the opportunity to use bathroom facilities. In this opinion, Magistrate Judge Putnam found the following facts:

> On July 6, 1993, plaintiff was assigned to work on a farm squad at the Limestone Correctional Facility, and shortly before 6:00 a.m. he was ordered to report to work. At that time, the plaintiff informed defendants Gilliken and Wise that he was suffering from a rash and was in need of medical attention. Sgt. Gates asked for

> the plaintiff's "stop-up" which is a medical authorization from the prison health care unit excusing prisoners from work due to health reasons. Plaintiff stated that he did not have one and that no one in the health care unit would give him a stop-up. Sgt. Gates told plaintiff that he could either go to work or "be placed on the security bar." Plaintiff refused to check out for his farm work unit, so defendant Gates escorted the plaintiff to a long metal bar to which he handcuffed the plaintiff. Plaintiff remained handcuffed at the bar or hitching rail from approximately 6:00 a.m. until approximately 2:00 p.m. that day. Although he had eaten breakfast that morning, he was offered no food or water or given any opportunities to use the bathroom facilities during the eight hour span. The daytime temperature ranged from 90 to 95 degrees. At approximately 2:00 p.m., the plaintiff was released from handcuffs and escorted by another officer to the prison health care unit for an examination. As a result of the handcuffing, the plaintiff suffered lacerations, pain, and swelling in his arms, although he was not treated by a physician at the health care unit.

(Doc. 37, Exhibit 3). In evaluating the plaintiff's claim arising under the Eighth Amendment, the court found this question "more problematic". Judge Putnam stated:

> He alleges that he was handcuffed to a bar or hitching post for eight hours without food, water, or the use of bathroom facilities in 90 to 95 degree heat. Plaintiff makes a strong argument that the practice of handcuffing recalcitrant prisoners to the security bar for eight hours is cruel and unusual punishment in that it amounts to wanton infliction of pain without

> penological justification. Because the defendants have pled the defense of qualified immunity, however, the court is not called upon to decide this difficult question because it is apparent that on July 6, 1993, there was no clearly established law identifying this practice as unconstitutional.

(Doc. 37, p. 31 [Exhibit 3]). In evaluating qualified immunity, Judge Putnam continued:

> [T]he court has made a diligent search of the case law to attempt to answer the question whether handcuffing, shackling, or chaining a prisoner to a fixed object for a period of several hours violated the Eighth Amendment prohibition against cruel and unusual punishment. It was with an eye toward this question that the court requested additional briefs from the parties, hoping to have their assistance in identifying any cases that might be said to clearly establish a rule of law in this area. Neither the court nor the parties have identified any cases, binding or otherwise in this circuit, in which it was found that the Eighth Amendment was violated by shackling or handcuffing a prisoner to a fixed object for a significant period of time due to the prisoner's refusal to work. Indeed the few cases that involve remotely analogous fact situations have upheld the use of physical restraints or coercive measures.

Id.

As Judge Ott stated when granting summary judgment to these respondents based on qualified immunity, "[t]hat the use of the restraining bar was not 'clearly established' as of the time of the defendants' conduct is amply demonstrated by the differing magistrate judge's

opinions cited by the parties dealing with the issue." (Doc. 45, pp. 20-21). The respondents were not put on notice by *Gates v. Collier*, *Ort v. White*, or *Williams v. Burton*. Consequently, the respondents were properly given qualified immunity for placing the petitioner on a restraining bar when he became disruptive to the work squad.

C. The longstanding Supreme Court decisions recognizing the unconstitutionality of the pillory and similar draconian devices did not give fair and clear warning that the use of handcuffs is the functional equivalent of the pillory and is similarly prohibited.

Petitioner seeks a ruling that the restraining bar, or "hitching post," is not distinct in structure, application, or effect from the pillory. The restraining bar used in the present case, unlike the pillory, does not restrain the head in any way, does not resemble the pillory in shape, is not made of wood, and utilizes handcuffs linked to a chain. It is a practical solution to the problem presented to prison guards when an inmate disrupts a work squad or refuses to work and cannot be returned to his cell.

A "pillory" is defined as "a wooden framework on a post, with holes for the head and hands." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1036-7 (3rd ed. 1993). Based on the petitioner's allegations, the restraining bar came to about shoulder height, and he was handcuffed to this bar. (Doc. 45, p. 8). Being placed on a restraining bar is obviously not equal in effect to being placed in a pillory because the restraining bar is an altogether different apparatus. With the restraining bar, for example, the

inmate has much more freedom of movement because his head is not locked in a wooden framework. Furthermore, unlike the pillory, if the inmate decides that he wants to return to work he will be released from the restraints. Unlike someone locked in a pillory, the inmate, in effect, holds the keys to his freedom from the restraint bar. Finally, unlike someone locked in a pillory, an inmate locked on the restraint bar is given access to water, food, and a bathroom.

Petitioner contends this Court found the pillory to be a violation of the Eighth Amendment in *Weems v. United States* because in dicta, this Court addressed the use of the pillory. *Weems v. United States*, 217 U.S. 349, 376 (1910). The Court of Appeals for the Eleventh Circuit has held that dicta cannot clearly establish the law for qualified immunity purposes. *Hamilton v. Cannon*, 80 F.3d 1525, 1530 (11th Cir. 1996); *see also Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmonson, J., dissenting) (even Supreme Court dicta cannot clearly establish the law for qualified immunity purposes), *adopted en banc*, 998 F.2d 923 (11th Cir. 1993); *Jones v. Evans*, 174 F.3d 1271, n.11 (11th Cir. 1999). Petitioner's reliance on dicta in *Weems* is therefore flawed because it does not clearly establish law.

Petitioner also includes *Ex Parte Wilson*, 114 U.S. 417, 5 S. Ct. 935, 29 L. Ed. 89 (1885) as authority regarding the issue of the pillory. *Wilson* concerns a habeas petition of a person convicted of passing a counterfeit United States bond. The petition was granted because the case had not been presented to a grand jury. *Id.* at 426. The opinion merely points out that the pillory was the punishment for perjury until the practice was abolished by acts of 1839.

Id. at 427. This opinion goes on to point out that imprisonment at hard labor was acceptable. *Id.* As with other cases the petitioner has cited, this case addresses the use of the pillory and has not put the respondents on notice that using the restraining bar violated any clearly established law.

The petitioner seeks to draw a comparison of the present case to two other cases this Court has decided, *Wilkerson v. Utah*, 99 U.S. 130, 9 Otto 130, 25 L. Ed. 345 (1878) and *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). These cases address the death penalty under the Eighth Amendment, and the facts of these cases in no way resemble the factual situation the present case presents. These cases could not give the respondents notice that their actions violated clearly established law because the facts of the present case are drastically different.

Finally, the petitioner cites the concurrence, not the majority opinion, of the United States Supreme Court case, *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2721, 33 L. Ed. 2d 346 (1972). *Furman* addresses whether a death sentence should be imposed in a capital murder case. This case also does not clearly establish law regarding whether it was improper for officials of the Alabama Department of Corrections to handcuff inmates to a horizontal bar after the inmates refused to work or were disruptive to the work squad. The restraining bar is simply not the same apparatus as the pillory. It would be impossible for Alabama Department of Corrections officials to reasonably conclude *Furman* provides clear guidance as to why the restraining bar is not an appropriate

tool to employ when attempting to encourage prisoners to go back to work.

D. Cases involving torture are not analogous to this case, making it unnecessary to overcome a claim of qualified immunity.

The petitioner contends that being handcuffed to a restraining bar, while being provided food, water, and bathroom breaks, is the equivalent of cases involving torture. The two cases the petitioner cites are not cases where the court found torture.

Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997), involves a person being arrested. In that case, after the subject was laid on the ground so he could be handcuffed, the police officer placed the subject's forearm in a position that caused the subject discomfort. After the subject complained, with a grunt and a blow, the officer caused the subject to suffer multiple fractures requiring surgery. Qualified immunity was denied in that case.

For a narrow exception to apply, "a plaintiff must show that 'the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.' " *Thomas v. Roberts*, 261 F.3d 1160, 1171 n.9 (11th Cir. 2001) (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)). The instant case does not meet this burden.

The other case the petitioner cites for the assertion torture is not required to overcome a claim of qualified immunity is *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir.

1996). *McMillian* involved an inmate who was incarcerated on death row in the Alabama State Prison System prior to his trial and conviction. *Id.* In that case, the Eleventh Circuit held that due to this Court's very clear prohibition of any pretrial punishment, it should have been obvious to a reasonable official not to place a person on death row prior to their conviction. *McMillian*, 88 F.3d at 1565. The Eleventh Circuit stated *McMillian v. Johnson* was an extraordinary case. *Id.* The respondents contend the facts in the instant case are not analogous to the facts in *McMillian v. Johnson*. In the present case, securing the petitioner to a restraining bar with access to food, water, and bathroom breaks was not such a blatant violation of the constitution as to eclipse the need for case law to put the respondents on notice.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

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